

1 (August 5, 2013)

2 **Escrow Bid Documentation**

3 **Scope and Purpose**

4 The purpose of this specification is to preserve the Contractor's bid documents for
5 use by the Contracting Agency in any litigation between the Contracting Agency
6 and Contractor arising out of this Contract.
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8 The Contractor shall submit a legible copy of all documentation used to prepare the
9 bid for this contract to a escrow institution designated by the Contracting Agency.
10 Such documentation shall be placed in escrow with the escrow institution and
11 preserved by that institution as specified in the following sections of this
12 specification.
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14 **Bid Documentation**

15 The term "bid documentation" as used in this specification means any writings,
16 working papers, computer printouts, charts, and any other data compilations which
17 contain or reflect all information, data, and calculations used by the Contractor to
18 determine the bid in bidding for this project. The term "bid documentation" includes
19 but is not limited to Contractor equipment rates, Contractor overhead rates, labor
20 rates, efficiency or productivity factors, arithmetic extensions, and quotations from
21 Subcontractors and materialmen to the extent that such rates and quotations were
22 used by the Contractor in formulating and determining the amount of the bid. The
23 term "bid documentation" also includes any manuals which are standard to the
24 industry used by the Contractor in determining the bid for this project. Such
25 manuals may be included in the bid documentation by reference. The term does
26 not include bid documents provided by the Contracting Agency for use by the
27 Contractor in bidding on this project.
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29 **Submittal of Bid Documentation**

30 The Contractor shall submit the bid documentation to the escrow institution. The
31 bid documentation shall be submitted to the escrow institution within seven
32 calendar days after the contract for this project has been executed by the
33 Contracting Agency. The bid documentation shall be submitted in a sealed
34 container. The container shall be clearly marked "Bid Documentation" and shall
35 also show on the face of the container the Contractor's name, the date of submittal,
36 the project title, and the contract number.
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38 **Affidavit**

39 The sealed container shall contain, in addition to the bid documentation, an affidavit
40 signed under oath by an individual authorized by the Contractor to execute bidding
41 proposals. The affidavit shall list each bid document with sufficient specificity so a
42 comparison can be made between the list and the bid documentation to ensure that
43 all of the bid documentation listed in the affidavit has been enclosed in the sealed
44 container. The affidavit shall show that the affiant has personally examined the bid
45 documentation and that the affidavit lists all of the documents used by the
46 Contractor to determine the bid for this project and that all such bid documentation
47 has been enclosed in the sealed container.
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49 **Verification**

50 The escrow institution upon receipt of the sealed container shall place the container
51 in a safety deposit box, vault, or other secure place, and immediately notify the
52 Contracting Agency in writing that the container has been received. Upon receipt of

1 such notice, the Contracting Agency will promptly notify the Contractor in writing
2 that the Contracting Agency will open the sealed container to verify that the affidavit
3 has been enclosed and to compare the bid documents listed in the affidavit with the
4 bid documents enclosed in the container to ensure that all of the bid documentation
5 has been submitted and that the copies are legible. The notification will advise the
6 Contractor of the date and time the container will be opened and the name of the
7 Contracting Agency employee who will verify the contents of the container. The
8 Contracting Agency employee verifying the contents of the escrow container will not
9 be involved or connected with the review, evaluation, or resolution of any claim by
10 the Contractor made to the Contracting Agency in connection with the contract for
11 which the verification was made. The Contractor may have representatives present
12 at the opening.

13 14 **Supplementation**

15 Documents listed in the affidavit but not enclosed in the sealed container through
16 error or oversight shall be submitted in a sealed container within five calendar days
17 after the opening of the original container. Also, any bid documentation that is
18 illegible shall be replaced with legible copies and furnished within five calendar
19 days after the opening of the original container. The face of the container shall
20 show the same information as the original container except the container shall be
21 marked "Supplemental Bid Documentation". The same procedure used in verifying
22 the contents of the original container shall be used in verifying the contents of the
23 supplemental submittal.

24 25 **Duration and Use**

26 The bid documentation and affidavit shall remain in escrow during the life of the
27 contract and will be returned to the Contractor by the escrow institution, provided
28 that the Contractor has signed the final contract voucher certification and has not
29 reserved any claims on the final contract voucher certification against the
30 Contracting Agency arising out of the contract. In the event that claims against the
31 Contracting Agency are reserved on the final contract voucher certification, the bid
32 documentation and affidavit shall remain in escrow. If the claims are not resolved
33 and litigation ensues, the Contracting Agency may serve a request upon the
34 Contractor to authorize the escrow institution, in writing, to release the bid
35 documentation and affidavit in escrow to the Contracting Agency. The Contractor
36 shall respond to the request within 20 days after service of the request. If the
37 Contractor objects or does not respond to the request within 20 days after service
38 of the request, the Contracting Agency may file a motion under the Civil Rules
39 requesting the court to enter an order directing the escrow institution to deliver the
40 bid documentation and affidavit in escrow to the Contracting Agency. The
41 Contractor shall respond to the request within the time required by the then
42 applicable Civil Court Rules for the Superior Court of the State of Washington. If
43 the Contractor objects or does not respond to the request within the time required
44 by the then applicable Civil Rules, the Contracting Agency may file a motion
45 pursuant to such rules requesting the court to enter an order directing the escrow
46 institution to deliver the bid documentation and affidavit in escrow to the
47 Contracting Agency. The escrow institution shall release the bid documentation
48 and affidavit as follows:

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50 1. To the Contracting Agency upon receipt of a letter from the Contractor
51 authorizing the release;
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2. To the Contracting Agency upon receipt of a certified copy of a court order directing the release of the documents;
 3. To the court for an in camera examination pursuant to a certified copy of a court order;
 4. The bid documentation and affidavit shall be returned to the Contractor if litigation is not commenced within the time period prescribed by law.

The Contractor agrees that the sealed container placed in escrow and any supplemental sealed container placed in escrow contain all of the bid documentation used to determine the bid and that no other bid documentation shall be utilized by the Contractor in litigation over claims brought by the Contractor arising out of this contract unless otherwise ordered by the court.

Remedies for Refusal or Failure to Provide Bid Documentation

Failure or refusal to provide bid documentation shall be deemed a material breach of this contract. The Contracting Agency may at its option refuse to make payment for progress estimates under Section 1-09.9 until the Contractor has submitted the bid documentation required by this specification. The Contracting Agency may at its option terminate the contract for default under Section 1-08.10. These remedies are not exclusive and the Contracting Agency may take such other action as is available to it under the law.

Confidentiality of Bid Documentation

The bid documentation and affidavit in escrow are and will remain the property of the Contractor. The Contracting Agency has no interest in or right to the bid documentation and affidavit other than to verify the contents and legibility of the bid documentation unless litigation ensues between the Contracting Agency and Contractor over claims brought by the Contractor arising out of this contract. In the event of such litigation, the bid documentation and affidavit may become the property of the Contracting Agency for use in the litigation as may be appropriate subject to the provisions of any court order limiting or restricting the use or dissemination of the bid documentation and affidavit as provided in the preceding section entitled Duration and Use.

Cost and Escrow Instructions

The cost of the escrow will be borne by the Contracting Agency. The Contracting Agency will provide escrow instructions to the escrow institution consistent with this specification.